STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. ROEHRIG,

Plaintiff-Appellee,

v

STATE AUTO MUTUAL INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED
July 5, 2005

No. 252742
Oakland Circuit Court
LC No. 2002-038111-CK

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

GRIFFIN, J. (*dissenting*).

Defendant appeals as of right from an $883,133.42 judgment in plaintiff's favor, pursuant to two appraisal awards in this homeowner's insurance case. I would reverse the judgment and remand for entry of a judgment in the sum of the replacement cost contract insurance limits, minus the deductible and previous payments made by defendant to plaintiff on these claims.[1]

I

This insurance dispute arises out of losses sustained at plaintiff's residence located at 2360 East Hammond Lake Road, Bloomfield Hills, Michigan. At the time of the occurrences, plaintiff possessed a policy of homeowner's insurance with defendant. The maximum policy limits were: building replacement - $343,800.00, contents replacement - $240,660.00, and living expenses - $68,760.00. Plaintiff sustained two separate losses, each of which resulted in a total loss of the house. The total losses occurred because of a January 16, 1999, storm and subsequent water and mildew damage to the premises, and a July 23, 2000, fire.[2] The residence was not

[1] The insurance policy limits for the residence are: building replacement - $343,800.00, contents replacement - $240,660.00, and living expenses - $68,760.00, for total monetary coverage of $653,220.00. Defendant has made prior payments as follows: building - $119,860.89, contents - $90,934.58, and living expenses - $51,859.97, for total prior payments of $262,655.44. In my view, after subtraction of the $500.00 deductible and prior payments from the insurance limits, a total judgment of $390,064.56, plus interest, should be entered.

[2] There is also reference in the file that the residence was struck by lightning on July 28, 2000, although the lightning damage appears to have been combined with the July 23, 2000, fire
(continued…)

repaired between the January 16, 1999, and July 23, 2000, occurrences. Both resulted in the total loss of the residence because the cost to repair the damage from either occurrence would be greater than the cost of totally rebuilding the house.

Pursuant to the insurance policy's appraisal process, the trial court appointed an umpire to resolve a dispute between the parties regarding the amount of damage sustained to the house as a result of the two occurrences. Ultimately, the umpire, Bryan Levy, rendered separate appraisal awards for each loss. The awards contained identical damages. Each state:

> I. BUILDING LOSS
>
> A. Replacement cost value (RCV) for tear down and rebuild . . .
>
> $242,520.41
>
> B. Actual cash value (ACV) of the tear down and rebuild of the premises . . .
>
> $181,390.30
>
> II. CONTENTS LOSS
>
> A. Replacement cost value (RCV) of the contents loss:
>
> $155,875.70
>
> B. Actual cash value (ACV) of the contents loss:
>
> $109,112.99
>
> III. ADDITIONAL LIVING EXPENSES
>
> Additional living expenses (ALE):
>
> $43,170.60
>
> This award takes into consideration the deductible, and all previously paid amounts to the Insured by the Insurer.

Based on the appraisal awards, the trial court entered a judgment in favor of plaintiff in the sum of $883,133.42. When previous payments from defendant are included, plaintiff was awarded total damages of $1,145,788.26. This sum far exceeds the insurance policy limit of $653,220.00.

(…continued)

damage.

I would hold that the appraisal awards contain a manifest mistake because it is apparent on the face of the awards that the damage amount exceeds the policy limits of the insurance contract.

II

Because an appraisal clause in a fire policy that calls for a determination by an umpire is a common-law arbitration agreement, judicial review of the appraisal process is limited to "instances of bad faith, fraud, misconduct or manifest mistake." *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 399; 605 NW2d 685 (1999), quoting *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992). Common-law arbitration is not subject to as strict a standard of review as is statutory arbitration. *Emmons, supra* at 466.

The statutory appraisal process used to settle a homeowner's insurance claim is a substitute for a judicial determination of a dispute of the amount of loss. *Allied Adjusters & Appraisers, supra* at 399. If the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. MCL 500.2833(m); *Allied Adjusters & Appraisers, supra* at 397. When they make a written demand for appraisal, each party chooses a "competent, independent appraiser." *Id.* Together, the appraisers pick a "competent, impartial umpire." *Id.* If the two appraisers are unable to agree upon an umpire, the insured or insurer may ask the trial court to select an umpire. *Id.* When any two of the three agree in writing on an amount, that amount becomes set and final. *Id.*

The insurance contract at issue provides for an appraisal award consistent with MCL 500.2833(m): "If [the parties' appraisers] fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of total loss." Contractual language is to be construed according to its plain and ordinary meaning, and technical or strained constructions should be avoided. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998).

Defendant argues that the judgment based on the two appraisal awards must be reversed because the appraisal awards were based on manifest mistake, bad faith, and misconduct. I agree, in part. I would reverse the judgment and modify the appraisal awards because of manifest mistake regarding the amount of recoverable damages. However, I disagree with defendant's arguments that the appraisal awards must be set aside based on alleged bias of the umpire or alleged fraud, misconduct, or bad faith of plaintiff's appraiser.

III. Manifest Mistake

On appeal, the parties dispute whether the two awards gave plaintiff a double recovery for a single loss. Defendant argues that it is apparent on the face of the awards that each loss necessitated replacement "for tear down and rebuild" of the house. Because plaintiff can recover only once for a total loss, *Great Northern Packaging, Inc v General Tire and Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986), 12 Couch on Insurance 3d, §§ 175:5 and 175:6, defendant argues that the duplicate award must be vacated. Plaintiff, on the other hand, contends that the arbitrator divided the total damages between the two losses and intended to award fifty percent of the total damages for each loss.

In my view, we need not decide whether the two awards duplicate the total damages for the reason that either award, in itself, contains a manifest mistake on its face because after taking "into consideration the deductible, and all previously paid amounts to the Insured by the Insurer," both awards exceed the insurance policy limits for the residence. Specifically, each appraisal award awards plaintiff $242,520.41 for building replacement cost for tear down and rebuild. However, defendant has made prior payments of $119,860.89 to plaintiff for the building. Accordingly, on its face, both appraisal awards contain a manifest mistake: when the prior payment of $119,860.89 is added to the replacement award of $242,520.41, its total sum of $362,381.30 exceeds the building replacement limit of $343,800.00 by $18,581.13. Similarly, when defendant's prior payments to plaintiff for contents of $90,934.58 are added to the replacement content award of $155,875.70, the total of $246,810.28 exceeds the policy limit contents replacement coverage of $240,660.00. Finally, when the award of additional living expenses of $43,170.60 is added to the prior payment by defendant of living expenses of $51,859.97, the living expenses of $95,030.57 exceed the policy limit for living expenses of $68,760.00.

Because the appraisal awards contain a manifest mistake on their face, when the amounts previously paid by the insurer to the insured are taken into consideration, I would modify the awards and remand for judgment in the amount of the policy limits, minus defendant's prior payments and the $500 deductible.[3]

IV. Umpire Bias

Next, defendant argues that the umpire was biased because he did not allow it to present evidence or participate equally in the appraisal process. Defendant also asserts that there was bad faith and misconduct by the umpire. The umpire may not favor either party, but must serve only equity, fairness, and justice. *Allied Adjusters & Appraisers*, *supra* at 401. Defendant concludes, based on the amount of the award, that the umpire must have seen evidence that it did not review. Defendant provided its appraiser's affidavit to attack the appraisal award. However, defendant waived the issue of the umpire's misconduct on appeal because defense counsel stated on the record that the challenge was "not really because of any misconduct per se on the part of [the umpire]. I don't want to . . . have the court base it's [sic] decision on that . . . ." In any event, the record does not support a finding of bad faith, fraud, or misconduct by the umpire.

V. Appraiser Misconduct

Finally, defendant contends that the appraisal award should be modified or set aside because of the fraud, misconduct, or bad faith of plaintiff's appraiser. The party attacking an appraiser's impartiality has the burden of showing prejudicial conduct. *Id.* Defendant argues

---

[3] I favor directing the entry of a judgment for the replacement cost value policy limits, rather than actual cash value, although at this time the residence and the personal property have not been replaced. In the event that timely replacement does not occur, I would allow defendant to bring an action against the plaintiff to recover the differential between actual cash value and replacement loss value.

that because plaintiff's appraiser previously acted as plaintiff's public adjuster, he committed misconduct in agreeing to the award. Defendant also asserted that plaintiff's appraiser was not an independent appraiser because he had not withdrawn his public adjuster contract. This Court has held that an insured's appraiser is not disqualified because he had a prior contract with the insured to adjust the loss. *Linford Lounge, Inc v Michigan Basic Property Ins Ass'n*, 77 Mich App 710, 713; 259 NW2d 201 (1977). Also, an independent appraiser is not disqualified, as long as the appraiser retains the ability to base any recommendation on his or her own judgment. *Allied Adjusters & Appraisers, supra* at 401. While defendant asserted that the appraiser was not independent, it did not meet its burden of proving that assertion.

I would reverse and remand for the entry of judgment consistent with this opinion and, therefore, respectfully dissent.

/s/ Richard Allen Griffin